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In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK J. MERLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 595 F. 2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1979. A petition for rehearing was denied on September 21, 1979. The petition for a writ of certiorari was filed on October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction should be reversed or the indictment dismissed because of prosecutorial misconduct.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing with intent to distribute and of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to consecutive terms of eight and five years' imprisonment, three years' special parole, and a fine of $15,000. The court of appeals affirmed petitioner's conviction but remanded to the trial court so that petitioner could be resentenced[1] (Pet. App. A-1 to A-11).

The evidence at trial showed that on December 17, 1975, Daniel Cacy was arrested in Jacksonville, Florida, by the Duval County Sheriff's Office. He was charged with possession and sale of a large amount of marijuana to an undercover officer (Tr. 165, 786, 801). Cacy had previously served prison terms for a number of offenses (Tr. 151-156, 285). In the hope of avoiding further incarceration, he offered to assist the Duval County Sheriff's Office by acting as a confidential informant (Tr. 156, 252-254, 335-339, 802-805).[2]

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[1]In accordance with *United States* v. *Hernandez*, 591 F. 2d 1019 (5th Cir. 1979) (en banc), the court held that consecutive sentences could not be imposed for distributing cocaine and for possessing cocaine with intent to distribute it where the two offenses were based on the same transaction.

[2]As a result of Cacy's assistance, the Duval County Sheriff's Office recovered a large quantity of marijuana, made several successful cases against gamblers and stolen art dealers, and seized a cocaine laboratory. In April 1976, the state charges against Cacy were dismissed. As reasons in support of the decision to drop the charges, the above enumerated assistance by Cacy was considered equally with the fact that Cacy had assisted "the Feds" in the instant case against petitioner. See Tr. 803-805, 812, 898-908.

On about January 12, 1976, Cacy traveled from Jacksonville to Miami, where an acquaintance introduced petitioner to Cacy as a person with whom he could negotiate for the sale of marijuana (Tr. 160, 164-167, 381-383, 397). Cacy became convinced that the petitioner would buy large amounts of marijuana (Tr. 166). Cacy went to Jacksonville and returned to Miami within a few days. He purchased four ounces of cocaine from petitioner in return for eight to ten pounds of marijuana and $2,400. Cacy hoped to sell petitioner 1,400 pounds of marijuana, but that transaction was not consummated (Tr. 167, 399-402).

After again returning to Jacksonville, Cacy informed the state authorities about his contacts with petitioner and told them that he might be able to arrange a large cocaine purchase from petitioner. The local officers introduced Cacy to Agents Ginley and Starrat of the Drug Enforcement Administration (DEA) in Jacksonville (Tr. 349-350, 353, 619, 777-778). On January 19, 1976, Cacy met Agent Fernandez at the DEA office in Jacksonville. In a recorded conversation, Cacy phoned petitioner from the DEA office, and they discussed Cacy's coming back to Miami for further negotiations (Tr. 157, 167, 533). That contact convinced Fernandez that there was a possibility, warranting further investigation, of learning about petitioner's illegal drug activities (Tr. 626-627).

Posing as a large supplier of marijuana from "out west," Fernandez was introduced to petitioner by Cacy on January 21, 1976, at Lums Restaurant in Miami (Tr. 197-198, 536, 543-544). They discussed a possible purchase of 50 pounds of cocaine at $14,000 or $15,000 per pound (Tr. 168, 198, 547-549). Fernandez told petitioner that he would have to rely on the latter's

expertise with regard to cocaine because Fernandez was more familiar with marijuana (Tr. 547). Petitioner described various types of cocaine, such as rock, crystal, and flake, and explained that it would be no problem for him to handle such a large amount, because it would come "right off the boat" (Tr. 548). Petitioner further advised Fernandez that he should purchase in pound quantities instead of kilograms in order to be assured of getting true weight (Tr. 548). It was agreed that petitioner would first deliver a sample in order to allow Fernandez to have the quality tested (Tr. 199, 203-204, 550). Fernandez agreed to purchase one-half pound for $8,000 (Tr. 200, 551). They then left the restaurant.

At about 8:00 p.m. that same day, Fernandez and Cacy again met petitioner at the restaurant and paid him the $8,000, with the understanding that the sample of cocaine would be delivered later that night (Tr. 202-204, 552-554, 602-603). Cacy and Fernandez returned to their motel to await further word from petitioner (Tr. 204-205, 604).

Surveillance agents followed petitioner while he went to several different locations and then returned to the same Lums Restaurant shortly after 11:00 p.m. (Tr. 736-739). At the restaurant, petitioner drove into the rear parking area and backed his car very close to a "Dempsey Dumpster" garbage bin, where he stopped momentarily; then he pulled into a parking place and entered the restaurant (Tr. 739). From the restaurant, petitioner called Cacy and Fernandez and requested that only one of them meet him at the restaurant (Tr. 205, 605-606).

Fernandez met petitioner at the restaurant about 11:30 p.m. (Tr. 210, 607). Petitioner pointed out the green "Dempsey Dumpster" to Fernandez and advised him

that the package of cocaine would be found behind the garbage bin, wrapped in a newspaper (Tr. 608). They left the restaurant together (Tr. 609, 740). Fernandez walked to the garbage bin, behind which he found the package inside the newspaper as described. Petitioner got into his car and used the headlights to illuminate the area while Fernandez looked for the package (Tr. 609-611, 740). The package contained 223.6 grams of cocaine of 42.7 per cent purity (Tr. 147, 608-611).

Cacy and Fernandez met with petitioner on several subsequent occasions but were unable to consummate the remainder of the cocaine deal. Petitioner was charged with possession and sale of the sample (Tr. 212-213, 612-614).

ARGUMENT

Petitioner contends that he is entitled to dismissal of the indictment or a new trial because of misconduct by the prosecutor.

1. At the close of the prosecutor's direct examination of Agent Fernandez, defense counsel requested any further Jencks Act material that had not already been furnished. The Assistant United States Attorney handling the case indicated that he believed that Agent Fernandez may have testified before the grand jury, but that he could not locate minutes of the grand jury session and that Fernandez did not recall having testified before the grand jury (Tr. 615). Fernandez testified on cross-examination that, although the case file showed that he had been subpoenaed to testify before the grand jury, he had no recollection of having done so (Tr. 617-618). The court subsequently ordered the Assistant U.S. Attorney to determine who had testified before the grand jury and to obtain a copy of the transcript if there was one (Tr. 682). The following day, the Assistant U.S. Attorney

confirmed that Fernandez had testified before the grand jury, but advised the court that his testimony had not been transcribed (Tr. 945-946). The court then ordered that the transcript be prepared (Tr. 948). See Pet. 9-10.

A transcript of the grand jury testimony was subsequently submitted to the court of appeals, which reviewed it and found that there was no "substantial inconsistency, contradiction or variation" between Fernandez's testimony at trial and his previous testimony before the grand jury (Pet. App. A-7 to A-8). Accordingly, the court of appeals found that petitioner was not prejudiced by the failure to have access to Fernandez's testimony at the time of trial (*id.* at A-8). Petitioner, who was also furnished with a copy of the transcript (*ibid.*), likewise has not pointed to any inconsistency between Fernandez's trial testimony and the grand jury testimony that he might have been able to exploit had the latter been available to him at trial. In the absence of any colorable showing of potential prejudice, petitioner is not entitled to relief.

2. Petitioner also complains (Pet. 8-9) of the failure of the prosecutor to furnish a report of a conversation between Fernandez and petitioner on January 23 or 24, 1976—several days after the transaction that formed the basis of the conviction in this case. The existence of such a report came to light near the beginning of defense counsel's cross-examination of Fernandez (Tr. 616-617).

Petitioner's counsel was furnished this report promptly after its existence became known to the prosecutor (Tr. 643-644). One paragraph of the report indicated that petitioner did not wish to talk about cocaine during his conversation with Fernandez, but instead wished to talk about lifting weights (Tr. 647). This paragraph, the district court concluded, if "[p]laced in the most

favorable light, * * * could be construed to be helpful to the defense" because it could be an indication that petitioner was not interested in getting into a narcotics deal with petitioner (*ibid.*). Accordingly, the court concluded (Tr. 647, 651-652) that the report was required to be furnished to petitioner under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and should have been furnished under the court's standing discovery order and, without specifying, "other orders of court."

Petitioner's counsel did in fact utilize the asserted *Brady* material in his cross-examination of Fernandez, eliciting from Fernandez testimony that petitioner wanted to talk about weight-lifting, not cocaine, following the initial transaction (Tr. 685-687, 691). Thus, even assuming that the timing of the production of the report was a failing of constitutional dimension (but see *United States* v. *Agurs*, 427 U.S. 97, 103, 112 n.20 (1976)), petitioner has demonstrated no prejudice from the incident. The court of appeals agreed (Pet. App. A-6), stating that "a careful reading of the record convinces us that no actual prejudice occurred" as a result of this or other asserted errors.

Moreover, the Assistant U.S. Attorney and Fernandez both testified that there was no intentional withholding of material (Tr. 656-657), and the trial court "detected nothing in this case that would indicate any willful type of conduct on the part of the prosecutor that would attempt to gain an advantage for the Government knowingly and intentionally to deprive the defendant of any of his rights" (Tr. 657). The court therefore concluded that the government had tried the case in "good faith" (Tr. 662-663).

3. Petitioner also argues (Pet. 12-13, 15-17) that dismissal of the indictment or a new trial is required

because of the prosecutor's questioning of a witness before the grand jury who had also been subpoenaed to testify at trial.

When petitioner learned that the informant, Cacy, had been arrested on state charges in Jacksonville, he employed an investigator to determine the circumstances surrounding those charges. The investigator learned that the state charges had been dismissed. Petitioner then subpoenaed persons familiar with the Jacksonville incidents to appear at trial (Tr. 431-432). Petitioner's counsel also informed the Assistant U.S. Attorney that the Jacksonville police were involved in a marijuana transaction with Cacy; the prosecutor then had these same witnesses subpoenaed to testify before a grand jury because of the indication of a possible violation of federal criminal law (Tr. 891-892).

One of the grand jury witnesses was asked by the attorney for the government if he had met with petitioner's counsel and, if so, what they had discussed. Petitioner argues (Pet. 6 n.2, 15, 17) that he was prejudiced by this questioning because the government was able to discover that counsel's principal interest was in learning the details of the arrangements for Cacy's cooperation with state officials on various matters (see note 2, *supra*). This, petitioner asserts, enabled the government to elicit at trial, on cross-examination of a former state prosecutor, that Cacy's cooperation with state officials played a role in dismissing the state charges against him in Jacksonville (Tr. 907-908). Petitioner argues that this questioning with respect to state charges "diluted" the impact of defense attacks on Cacy's motive for testifying as a prosecution witness, which the defense asserted was that the state charges pending in Jacksonville would be dropped in exchange for cooperation with DEA agents and favorable testimony in the *federal* proceedings.

Although we do not condone the use of compulsory process in order to question a witness about his conversations with defense counsel in a pending case,[3] there is no suggestion here that the grand jury inquiry was undertaken to ascertain the defense strategy in the present case. The inquiry was undertaken for the legitimate, independent reason of looking into allegations by petitioner's counsel of criminal activity involving the Jacksonville police force. Only one witness was asked about his conversations with defense counsel.

Moreover, it is clear that petitioner was not prejudiced as a result of this questioning. The entire cross-examination of the state prosecutor by the Assistant U.S. Attorney with respect to the importance of Cacy's cooperation with state and federal authorities was as follows (Tr. 908):

> Q. Now on a new subject again.
>
> * * * In dismissing the charges against Daniel Cacy, what relative weight would you give his cooperation with DEA; that is, was it of great importance that he cooperated with DEA?
>
> A. Yes sir, I believe it was.
>
> Q. Now, was his cooperation with the state authorities of the same importance?
>
> A. Yes sir.

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[3]We would not necessarily regard it as improper, however, for an attorney for the government to ask a possible witness in a case about his conversations with defense counsel, so long as the compulsory process of the grand jury was not exploited for this purpose.

The former state prosecutor reiterated the fact that Cacy's cooperation with DEA had "great weight" in the decision to drop the state charges in his redirect examination by defense counsel (*ibid.*; see also Tr. 900-901). Thus, while the Assistant U.S. Attorney did elicit testimony that the state cooperation played a role in the dismissal of the state charges, he also emphasized, as had the defense, the importance of the cooperation with DEA.

It would hardly have been surprising to the prosecution that petitioner's counsel was interested in discovering the nature of the arrangements between Cacy, the Jacksonville police, and DEA agents in order to enable counsel effectively to impeach Cacy's credibility at trial. And, petitioner had effectively impeached Cacy at trial in any event. Cacy admitted that he lied to the police (Tr. 274-275), to petitioner (Tr. 395), and to his mother (Tr. 372). Thus, the district court stated to petitioner's counsel (Tr. 436):

> You have elicited from him [Cacy] the absolutely devastating impeachment of his credibility, so that * * * I don't know how much more you could do. Once you destroy and buy the credibility of a witness * * * as effectively as you have done * * * I don't know how the defendant is prejudiced.

Under these circumstances, there can be no serious suggestion that petitioner was prejudiced as a result of the grand jury incident.

4. Petitioner also argues (Pet. 9) that the government improperly failed to inform him that Cacy had been led to believe that in return for his cooperation, the government would not prosecute him for transporting 1,400 pounds of marijuana to Miami (see page 3, *supra*)

and failed to disclose that the statement filed in connection with the dismissal of the state charges in Jacksonville mentioned that Cacy had assisted the "Feds" in a $700,000 cocaine buy as one of the bases on which the state charges were dropped (see note 2, *supra*). However, Cacy testified at trial that he believed he would not be prosecuted for transporting the 1,400 pounds of marijuana to Miami if he cooperated with law enforcement officials (Tr. 477-478). Moreover, the fact that the statement filed in connection with dismissal of the state charges referred to Cacy's cooperation with the "Feds" was brought out on direct examination of the former state prosecutor (Tr. 901), and Agent Fernandez testified at trial that he was aware that Cacy believed he would be benefited in connection with the state charges if he cooperated in the DEA investigation (Tr. 626). Because these matters were brought out at trial, there is no basis for any claim of constitutional error arising from suppression of exculpatory evidence.[4]

In sum, while we do not condone the carelessness of the prosecution in failing to make Agent Fernandez's grand jury testimony available to the defense at trial as required by the Jencks Act or the inappropriate grand jury questioning regarding conversations between a prospective witness and defense counsel, neither these

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[4]Petitioner also argues (Pet. 8) that there was prosecutorial misconduct in what he labels as a misrepresentation by the government as to the content of certain tapes of conversations between Cacy and others. However, as the magistrate, the district court, and the court of appeals found (Pet. App. A-4 to A-5), the prosecutor had relied on representations made by others and did not intentionally misrepresent the contents of these tapes. In any event, those portions that contained conversations referring to petitioner were turned over to petitioner in advance of trial, and there was therefore no prejudice to petitioner.

incidents nor the others of which petitioner (with far less justification) complains resulted in any significant prejudice to his defense. Even where the prosecution knowingly employs perjured testimony or allows such testimony to go uncorrected—far more culpable conduct than is charged in this case—dismissal of the indictment is not an appropriate remedy (see, *e.g.*, *United States* v. *Acosta*, 526 F. 2d 670 (5th Cir. 1976)), and a new trial is awarded only upon a showing that there is some "reasonable likelihood" that the prosecutorial misconduct could have affected the judgment of the jury. *United States* v. *Agurs*, *supra*, 427 U.S. at 103; *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972). Petitioner has not even satisfied this most generous of standards.[5]

[5]Petitioner also asserts (Pet. 19-20) that the court of appeals erred in holding that he waived his right to object to the errors assigned when he declined to move for a mistrial after the district court had invited him to do so (see Pet. App. A-6). This holding, he asserts (Pet. 19-20; Supp. Br. 3-7), is in conflict with the Fifth Circuit's decision in *United States* v. *Hammond*, 598 F. 2d 1008, 1012-1015 (5th Cir. 1979), in which the court held that the appellant was entitled to a new trial notwithstanding his decision not to move for a mistrial.

However, in the instant case, the court of appeals' observation that petitioner had not moved for a mistrial was an alternative holding. The court also held that there was no actual prejudice to petitioner, which, as the opinion makes clear (Pet. App. A-6), alone sufficed to support affirmance of his conviction.

Moreover, the two decisions are not in conflict. The *Hammond* panel, on rehearing, expressly relied on the exceptional facts of that case (Supp. Br. App. A-4, A-6 n.3) and the fact that prejudice to the appellant was "clearly established" (*id.* at A-6 n.3) in distinguishing the present case and reversing for a new trial. In any event, an intra-circuit conflict is not ordinarily a basis for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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